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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957

No. 99

FRANK ANDREW PAYNE ..... *Petitioner*

v.

STATE OF ARKANSAS ..... *Respondent*

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE
STATE OF ARKANSAS

BRIEF FOR THE RESPONDENT

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OPINION BELOW

The opinion of the Supreme Court of Arkansas (R. 131) is reported at 295 S.W. 2d 312.

JURISDICTION

The judgment of the Supreme Court of Arkansas was entered November 5, 1956 (R.131), and a petition for rehearing was denied December 3, 1956 (R.141). The petition for a writ of certiorari was granted April 8,

1957 (R.141). The jurisdiction of this Court rests upon 28 U.S.C. § 1257 (3).

QUESTIONS PRESENTED

1. Whether the concurrent findings of the two lower courts that the petitioner's confession was not induced by threats, mistreatment, fear or intimidation were correct.

2. Whether there is substantial evidence in the record to support the finding that the petitioner failed to meet the burden of showing discrimination in the selection of the jury panel and jury commission.

STATUTES INVOLVED

Amendment Fourteen to the Constitution of the United States, 18 U.S.C. 243, and the Statutes of Arkansas (1947) §§ 39-201, 39-206, 39-208, 39-209, 39-210, 39-212, 39-301.1, 43-403, 43-601, 43-605.

STATEMENT

The petitioner, Frank Andrew Payne, was charged by information October 14, 1955, with the crime of first degree murder (R.1). The cause came on for trial January 11, 1956 (R.43). The jury returned a verdict of guilty of first degree murder and fixed Payne's punishment at death in the electric chair (R.130). On appeal to the Supreme Court of Arkansas the conviction was affirmed (R.131). The Supreme Court of Arkansas denied a petition for rehearing December 3, 1956 (R.141).

On October 4, 1955, the day of the murder, Payne was employed at the Bluff City Lumber Company, which was owned and operated by the victim, J. N. Robertson. Evan Reed, also an employee, testified that he left the company office about 5:30 p.m. on the day Robertson was killed, and that the deceased and Payne were

the only ones there when he left. He returned a few minutes after 6:00 o'clock and found Roberston lying on the floor with his head in a pool of blood. The money in the cash drawer was gone. The following day police officers went to Payne's home and found his clothes blood stained. After his arrest Payne pointed out to a witness where he got the iron murder weapon and where he had placed it after striking the deceased (R.136,137). When the officers took Payne to his home, he told them where they would find the money. He said that it was hidden in a piano, and upon searching the piano the officers found $440.00.

In his confession Payne admitted that after locking the back door of the building, he picked up an iron rod and struck Robertson on the head, knocking him to the floor, and then hit him five or six times more. He then removed the money from the cash drawer, left the building, dropped the iron rod in a ditch, and went home. He gave his nephew about 30 or 40 dollars to take home with him (R.99).

FACTS SURROUNDING THE ARREST AND SUBSEQUENT CONFESSION

The arrest was made without a warrant on Wednesday morning October 5, at the Bluff City Lumber Company (R. 63,112). Payne was advised that he was being placed under arrest because of some falsehoods that he had told (R.64). He had been questioned the night of the murder and was questioned again for a short period the afternoon of his arrest (R.64,112).

Sergeant Buck Halsell, of the Arkansas State Police, in order to test them for blood stains, removed Payne's shirt, pants, shoes and socks on the afternoon of October 5 (R.64,70,104,110).

The following morning, October 6, Sergeant Halsell and Pine Bluff Police Chief Norman Young took Payne to State Police Headquarters in Little Rock where he was given a voluntary lie detector test (R.61,64,105). A few minutes after arriving at headquarters in Little Rock, Sergeant Halsell returned Payne's shoes and socks to him (R.57). Chief Young, who was present during the lie detector test, said there were no threats or profanity directed toward Payne (R.65). About noon, Payne was returned to the custody of Sergeant Halsell who brought him two sandwiches (R.7). Halsell, Young and Payne then returned to Pine Bluff where Payne was placed in jail for the remainder of the night (R.66).

The record reflects no more questioning until around 1:00 p.m. on October 7, at which time Payne indicated to Chief Young that he wished to make a statement. Chief Young told him that it was possible that 30 or 40 people would be there within a few minutes, but that he would give him the opportunity to confess in private (R.69,113). Payne then made his confession, and in approximately five minutes, with Payne's approval, the other people were admitted (R.69). The confession was then repeated and transcribed by a court reporter, Mrs. Morah Duensing (R.84). Persons connected with the confession, the investigating officers and disinterested witnesses, all testified that the confession was voluntarily made (R.51,63, 72,76,79,84).

After making the confession, Payne went to the scene of the murder and reenacted it. When he had finished the reenactment and was some 15 or 20 feet from the others present, Bill Miles, a news reporter for the Pine Bluff Commercial, asked him if he had been mistreated in any way. He said that he had not, that he had never been treated nicer (R.72,73).

Late in the afternoon of October 7, after Payne had confessed, he was taken to Dumas by Sergeant Halsell (R.58,66,91,106). He was moved to Dumas on the recommendation of Chief Young and Sheriff Norton (R.106). They had received some telephone calls and felt that it would be best for Payne (R.106).

PETITIONER'S EVIDENCE OF SYSTEMATIC EXCLUSION

In support of his motion to quash the jury panel the petitioner placed into evidence the general characteristics of the population of Jefferson County, the testimony of Jury Commissioners Trulock, Bobo and Williams, and the testimony of his attorney as to the number of Negroes who had actually served on the jury panels since 1947.

The records of the Bureau of Census of the Department of Commerce reflect that for the year 1950 the total population of Jefferson County was 76,075, classified as follows: native born white, 37,792; foreign born white, 360; Negroes, 37,835; other races 88 (R.18). Allen Sheppard, County Clerk of Jefferson County, testified that for the year 1955 the total number of qualified voters was 19,452, 13,678 were white and 5,774 were Negroes (R.18).

Jury Commissioner Trulock testified that he had lived in the county for 57 years and thought he was as well qualified to select either white or Negro jurors as anybody else. He knew many Negroes that he thought were qualified for jury service (R.11). W. E. Bobo, another commissioner, said that he did not know that there was any particular number of Negroes that had to be selected. They did not decide how many Negroes would be selected, they merely opened the list of electors and selected persons they thought would make good jurors. He would have selected a panel including more Negroes

than white if he had thought they were good citizens and reliable in their actions. He knows quite a few colored people and has been doing business with them quite awhile; however, all of them would not be qualified, since they didn't have poll tax receipts (R.14). When they selected Al Pennington, a Negro, on the panel there was nothing special about it as they felt that the jury they were selecting were responsible citizens of the county (R. 15). The third commissioner, E. L. Williams, testified that he remembers that some Negroes were selected for the panel but does not remember how many. He did not give any thought to whether Negroes should be selected on a proportional basis or that there should be any certain number. They thought that some should be on each panel and as he remembered they did put so e on each panel (R.16).

Wiley A. Branton, the petitioner's counsel, testified that he had examined the jury payroll record and found the following information:

TERM OF COURT	TOTAL NO. JURORS	TOTAL NO. NEGROES
October, 1947	31	2
March, 1948	31	0
October, 1948	38	1
March, 1949	24	2
October, 1949	32	2
March, 1950	64	1
October, 1950	29	0
March, 1951	54	2
October, 1951	35	1
March, 1952	31	2
October, 1952	50	1
March, 1953	42	2
October, 1953	46	6

March, 1954	25	1
October, 1954	39	0
March, 1955	40	4
October, 1955	58	2

He knows that from time to time Negroes have been excused from jury service and that their names would not show on the list he testified from (R.24,25). He is also familiar with the fact that Negroes have served on juries in Jefferson County that tried white citizens. He has no information as to how many Negroes may have been selected but were excused by the court (R.26). Several Negro witnesses testified that although they have served on juries they did not remember any Negro ever being a jury commissioner (R.27,29,30,31,32,33,34,35,36).

Based upon the foregoing evidence, the Supreme Court of Arkansas concluded that the confession was properly admitted into evidence and further that the petitioner failed to show any discrimination. Judge Paul Ward, speaking for a unanimous court, said:

> "The sheriff admits that shortly before the confession was actually given he merely informed appellant that there were several people outside the jail. His explanation was that appellant had already indicated he wanted to make a confession and the sheriff thought it would be better to have the confession made in private, having in mind the safety of appellant. Any statement that might have been made to appellant while in jail at Dumas could not have influenced his confession which had already been made the day before. Before the trial court decided to admit appellant's confession in evidence he heard voluminous testimony, in chambers, from all of the officers and people who had been in contact with appellant during his period of confinement before the confession was made. All of them deny that appellant was mistreated in any way or that he was in any way threatened. This

procedure was approved in *McClellan* v. *State*, 203 Ark. 386, 156 S.W. 2d 800, and we are convinced that the confession was properly introduced in evidence. It is true that some of appellant's relatives were arrested soon after he was taken into custody but, as explained, this was done in an effort to prevent the money which appellant was supposed to have taken from the deceased from being disposed of."

* * * * * * * * *

. . . "It is shown by the testimony that the 29 Negroes who had actually served on the jury panel since 1947 did not include all the Negroes who had been selected for service. On the other hand it was shown that many others, the numbers undisclosed, had been selected but had not served for different reasons. The burden therefore was not on the State but on the appellant to introduce testimony showing discrimination."

ARGUMENT

I

CONFESSION

The petitioner claims that he was denied due process when his confession was admitted into evidence. He bases this claim on the alleged facts of being mentally retarded, arrested without a warrant, sustained interrogation, deprivation of food, threats of mob violence, held incommunicado and that members of his family had been threatened with arrest.

The record evidence of being mentally retarded, consists of testimony from a former school teacher, Mrs. S. M. Wimberly, to the effect that the petitioner was slow learning and lazy (R.119). Mrs. Wimberly also testified that over a four-month period the petitioner missed 23 days out of 74 (R.121). The combination of laziness and absenteeism more nearly supports an inference as to the reason for failing grades than does the contention of being mentally retarded.

There is no dispute as to the petitioner's being arrested without a warrant, since under the Arkansas law a peace officer may arrest without a warrant when he has reasonable grounds for believing that the person arrested has committed a felony. Ark Stats. (1947) § 43-403.

As to the petitioner's claim of sustained interrogation the record reveals that petitioner was arrested on the morning of October 5 (R.63). After his arrest he was place in jail and that afternoon was questioned for a short period (R.64). The following morning the petitioner volunteered to take a lie detector test and was

taken to Little Rock for that purpose (R.61). The exact time that the petitioner was taken to Little Rock is not clear from the record, however, it was sometime between 7:00 a.m. and 9:00 a.m. on the morning of October 6 (R.55,64). The petitioner was given a lie detector test and returned to the officers around noon (R.57). After returning to Pine Bluff the petitioner was placed back in jail for the remainder of the night (R.66). The record reflects no further questioning until the next afternoon when the petitioner indicated to Chief Young that he wanted to make a confession (R.69). Of course the phrase "sustained interrogation" is a generalization and could mean constant questioning for ten minutes. The petitioner makes no claim of sustained interrogation over a long period of time, and if he did, the record itself would refute the claim. The record here fails to show any continuous interrogation, hence, the petitioner's allegation in unfounded. Furthermore, the petitioner did not testify that the reason he confessed was due to any sustained interrogation.

Another claim of the petitioner is that he was deprived of food. Chief Young said that the first meal is served at the jail around 8:00 a.m., and the last meal between 4 and 5:00 p.m. He did not know whether the petitioner was fed or not (R.64). The petitioner was placed in jail on October 5 and Chief Young said that it was possible that he was being questioned at the time the prisioners were fed (R.64). The next morning the petitioner was taken to Little Rock and the officers did not know whether he was fed that morning or not (R.56). However, about noon, on October 6, Sergeant Halsell gave him two sandwiches (R.57). The petitioner was then returned to Pine Bluff and placed in jail for the remainder of the night and according to the record was in the jail during the evening meal (R.66). The petitioner was

in jail the next morning, October 7, when the first meal was served, since he remained there until 1:00 p.m. when he told Chief Young that he wanted to confess (R.69). The petitioner admits that he was given a sandwich while at State Police Headquarters (R.89,124). He also said that he was given a candy bar and a bag of peanuts (R.125). The petitioner never says in his testimony that the reason he confessed was because he was hungry. If the officers had intended to starve him into a confession certainly they wouldn't have fed him at all.

The petitioner claims that the suggestion of mob violence was raised twice, the first time by the jailer at Dumas, and again by Chief Young. Any claim relating to what occurred at Dumas is immediately rejected by the record evidence. The evidence is abundant showing that the petitioner was not removed to Dumas until after he had confessed (R.58,60,66,90,91,106). In this connection, the Supreme Court of Arkansas said:

> "... Any statement that might have been made to appellant while in jail at Dumas could not have influenced his confession which had already been made the day before (R.133)."

The second so-called threat of mob violence is based on an inference drawn from the testimony of Chief Young. Young, when asked if he told the petitioner there might be 30 or 40 people there within a few minutes, answered that he told the petitioner it was possible (R.69). Continuing to testify, Young said that the petitioner confessed to him privately, and later on the other people came in (R.69). It is apparent that what Chief Young meant was that there would be other people there to witness the confession. The petitioner said that he became afraid because of the statement of Young and that is the reason he confessed (R.128). However, his demeanor immediately subsequent to this conversation was any-

thing but that of a person in fear. Mrs. Duensing, the reporter who transcribed the confession, testified that the petitioner seemed to be very calm and more interested in what she was doing than in what he was saying. He watched her take the confession in shorthand and would pause as though he wanted to be sure that he did not talk too fast (R.85). This evidence, and the petitioner's demeanor, fails to support the inference of fear of mob violence.

The allegation of being held incommunicado is likewise without foundation. The evidence is clear that the petitioner was arrested about 11:00 a.m. on October 5. He was questioned that afternoon for a short period and returned to the jail for the rest of the night. The next morning he took a lie detector test in Little Rock and was returned to Pine Bluff and again placed in jail for the night. The next day, without further questioning he confessed. Before confessing he was asked if he wanted counsel and he replied that he did not (R.98). Chief Young stated that to his knowledge no one asked to see the petitioner (R.66). Young was asked if he would have permited a lawyer to see the petitioner and he said that he would (R.75).

The petitioner says in his brief that there is no dispute that prior to his confession two of his brothers and two of his nephews were arrested and brought to the City Jail and that he was threatened with the arrest of his mother and entire family if he did not confess. The record itself disputes any such allegations. Chief Young said very frankly that James Davis was arrested and placed in jail overnight. The two minor children were brought to the police station and questioned only after they had volunteered to do so (R.114). The arrest and questioning was obviously done to recover the money stolen

from the victim. No other member of the petitioner's family was even questioned, much less arrested (R.115).

In his confession, the petitioner admitted that he had not been mistreated, neither had he been promised anything in the way of reward or leniency, nor had he been threatened by any officer (R.100). This statement of the petitioner is corroborated by Bill Miles, a reporter for the Pine Bluff Commercial, who privately asked the petitioner if he had been mistreated in any way and the petitioner answered to the effect that he had never been treated nicer (T.72,73).

It is true that the petitioner was not arraigned as required by Ark. Stats. (1947) § 43-601. However, it is the common practice in Arkansas to waive the arraignment as in this case (R.50). The Supreme Court of Arkansas has said many times that by announcing ready for trial and going to trial persons waive their right to have a formal arraignment. *Hayden* v. *State*, 55 Ark 342; *Davidson* v. *State*, 108 Ark. 201. The fact that a confession is obtained during a period of illegal detention does not make confession inadmissible per se. *State* v. *Browning*, 206 Ark. 791. And as was said in *Stein* v. *New York*, 346 U.S. 156:

> "Petitioners confuse the more rigid rule of exclusion which, in the exercise of our supervisory power, we have promulgated for federal courts with the more limited requirements of the Fourteenth Amendment. This, we have held, did not impose rules of evidence on state courts which bind them to exclude a confession because, without coercion, it was obtained while a prisoner was uncounseled and illegally detained. *Stroble* v. *California*, 343 U.S. 181, 197; *Lisenba* v. *California*, 314 U.S. 219."

The procedure for receiving confessions into evidence in Arkansas is for the trial court to hear the testimony

in the absence of the jury as to the circumstances under which the confession was given, and if the court finds that it was not involuntary to submit the question to the jury, after admonishing them to disregard the confession unless it was found to have been voluntarily made. *McClellan v. State*, 203 Ark. 386. This procedure was followed in the case at bar (R.134). And as in *Stein v. New York*, *supra*, there is ample independent evidence of the petitioner's guilt. Consequently, it cannot be determined whether the jury took the confession into consideration when they decided the petitioner's guilt or not.

The petitioner cites many cases to support his contentions that the confession was not voluntary. However, each of the cited cases contains different factual situations than are presented here. The evidence in the record does not show the use of any physical force, nor does it reflect any psychological coercion. The petitioner was not questioned for any unreasonable length of time, in fact, he was questioned on the night of the murder, for a short period the next day, and during a lie detector test. He was not questioned at all on the day he confessed except during the confession itself. His detention prior to the confession was only from about noon on Wednesday until he confessed around 1:00 p.m. on Friday. The circumstances surrounding this confession falls considerably short of showing a coercion.

II

JURY DISCRIMINATION

The petitioner argues that since no Negro has ever served as a jury commissioner in Jefferson County, he has been discriminated against within the meaning of the Fourteenth Amendment; he argues that systematic exclusion of Negroes from serving on grand juries as well

as petit juries has been held to be a denial of the Equal Protection Clause of the Fourteenth Amendment. The petitioner cites no authority to support his jury commission argument and indeed there appears to be none. The jury commissions' sole purpose it to select the persons who shall serve on the jury panels. They are sworn to choose competent and qualified jurors—not to convict. The difference between the function of the jury commissioners and the petit jury is all the difference between deciding a case and merely deciding who shall compose the jury panels. The same contention arose and was answered in *Maxwell v. State*, 217 Ark. 691, 232 S.W. 2d 982, where the Supreme Court of Arkansas said:

> "Appellant further contends that he was discriminated against within the meaning of the Fourteenth Amendment because there were no Negroes on the Jury Commission. We know of no rule making this requirement and the suggestion must be rejected."

In support of his motion to quash the jury panel, the petitioner introduced the United States census figures of 1950 which showed the population of Jefferson County to be 76,075, classified as follows:

Native born white	37,792
Foreign born white	360
Negroes	37,835
Other races	88

Allen Sheppard, County Clerk, testified that there were the following qualified electors in Jefferson County:

YEAR	TOTAL ELECTORS	WHITE	NEGRO
1953	18,315	12,674	5,641
1954	18,887	13,157	5,730
1955	19,452	13,678	5,774

Under this evidence the petitioner argues that there was a systematic exclusion of Negroes from jury service. To support his argument he cites *Hill* v. *Texas*, 316 U.S. 400; *Patton* v. *Mississippi*, 332 U.S. 463; *Norris* v. *Alabama*, 294 U.S. 587. In the Hill case no Negroes had served on the grand jury in 16 or more years. In the Patton case it was shown that no Negroes had served on a grand or petit criminal court jury for 30 years. The same is true in the Norris case where no Negro had served on a grand or petit jury within the memory of witnesses who had lived there all their lives. In the case at bar even the payroll record, which did not reflect all the persons chosen, showed that Negroes have been selected for jury service on practically every panel since 1947. Two Negroes were on the panel at the term during which the petitioner was tried. Consequently, any inference of systematic exclusion is repelled by the petitioner's own evidence.

A similar lack of evidence arose in *United States* v. *Brandt*, 139 F. Supp. 349 (N. D. Ohio E. D., 1955), and the Court said:

> "Yet no evidence as to the number of colored persons who were summoned for petit jury service has been submitted. This serious void in the evidence cannot be filled by argument based upon speculation and conjecture."

Petitioner insists that the jury commission systematically included a few Negroes on the panel, but they did it in such a manner as to further discriminate by restricting the number selected. However, there is nothing in this record to substantiate such an assertion.

The fact that the jury commissioners selected Negroes for the panel satisfies the burden placed on the State under the holding in *Patton* v. *Mississippi*, 332 U.S. 463,

and the burden then devolved on petitioner to show that the jury commissioners practiced "evasion". There is no such showing. The language of this Court in *Akins* v. *Texas*, 325 U.S. 398, is a complete answer to the petitioner's assertion. This Court said:

> "Petitioner's sole objection to the grand jury is that the 'commissioners deliberately, intentionally and purposely limited the number of the Negro race that should be selected on said grand jury panel to one member.' Fairness in selection has never been held to require proportional representation of races upon a jury. *Virginia* v. *Rives*, 100 U.S. 313, 322-23; *Thomas* v. *Texas*, 212 U.S. 278, 282. Purposeful discrimination is not sustained by a showing that on a single grand jury the number of members of one race is less than that race's proportion of the eligible individuals. The number of our races and nationalities stands in the way of evolution of such a conception of due process or equal protection. Defendants under our criminal statutes are not entitled to demand representatives of their racial inheritance upon juries before whom they are tried. But such defendants are entitled to require that those who are trusted with jury selection shall not pursue a course of conduct which results in discrimination 'in the selection of jurors on racial grounds.' *Hill* v. *Texas*, *supra*, (316 U.S. 404). Our directions that indictments be quashed when Negroes, although numerous in the community, were excluded from grand jury lists have been based on the theory that their continual exclusion indicated discrimination and not on the theory that racial groups must be recognized. *Norris* v. *Alabama*, *supra*, (294 U.S. 587); *Hill* v. *Texas*, *supra*, (316 U.S. 400); and *Smith* v. *Texas*, *supra*, (311 U.S. 128). The mere fact of inequality in the number selected does not in itself show discrimination."

The petitioner also claims that the testimony of Jury Commissioners Trulock, Bobo and Williams brings this

case squarely within the holding of *Cassell v. Texas*, 339 U.S. 282. In his brief he has taken out of context certain statements made by the commissioners and has used these excerpts in an attempt to stretch the holding in the Cassell case to the one at bar. Since the State of Arkansas, as well as the petitioner, is entitled to some consideration under the United States Constitution, it should be pointed out that Trulock also testified as follows:

"Q. . . . I want to know whether or not your general knowledge of the Negroes in Jefferson County among those who would be qualified for jury service is extensive enough that you could fairly select Negroes to serve on the jury panel?

A. I think this; I have lived in this county for 57 years; I think I would be as well qualified to select either white or black as anybody else.

Q. Do you know very many Negroes who would be qualified for jury service?

A. I think so" (R.11).

Jury Commissioner W. E. Bobo, testified:

"Q. Were you concerned as to how many Negroes should be on the jury panel?

A. Well we didn't know there was any special amount that had to be selected, no.

Q. Did you decide how many you would put on there?

A. Well, no, we didn't decide. We went through the list after we opened the list and we selected those that we thought would make good jurors.

* * * * * * * * * * *

Q. 'Would you have selected a panel including more Negroes than whites?'

A. I think I would if it had been folks who we thought would have been good citizens and who had been reliable in their actions I think, yes" (R.14).

The testimony of the jury commissioners in the Cassell case and in the case at bar are entirely different. In the Cassell case no Negroes were on the grand jury involved. In the present case there were two Negroes on the petit jury panel. The jury commissioners in the Cassell case testified that they did not know any Negroes they thought qualified. Here, the jury commissioners testified that they were acquainted with many Negroes whom they thought were qualified, and that the only reason that more were not named to serve on this particular panel was that they had served on juries within the last year. Trulock said that he did not feel he could name anyone to the jury that he did not know, but this applied to both white and colored. In the Cassell case at page 287 this Court made clear the basis of its decision when it stated:

> "Our holding that there was discrimination in selection of the grand jurors in this case, however, is based on another ground. In explaining the fact that no Negroes appeared on this grand jury list, the commissioners said that they know none available who qualified; at the same time they said they chose jurymen only from those people with whom they were personally acquainted."
>
> . . . . . .
>
> "The statements of the jury commissioners that they chose only whom they knew, and that they knew no eligible Negroes . . ., is discrimination in violation of petitioner's constitutional rights."

The evidence in the case at bar shows no such lack of knowledge.

CONCLUSION

For the reasons stated it is respectfully submitted that the judgment of the court below should be affirmed.

Respectfully submitted,

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January 15, 1958

APPENDIX

Ark. Stats. (1947) § 43-403.

Peace officer, when may arrest. A peace officer may make arrest:

First. In obedience to a warrant of arrest delievered to him.

Second. Without a warrant, where a public offense is committed in his presence, or where he has reasonable grounds for believing that the person arrested has committed a felony.